TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. ~~494~~ 147

CHARLES C. PENNINGTON, PLAINTIFF IN ERROR,

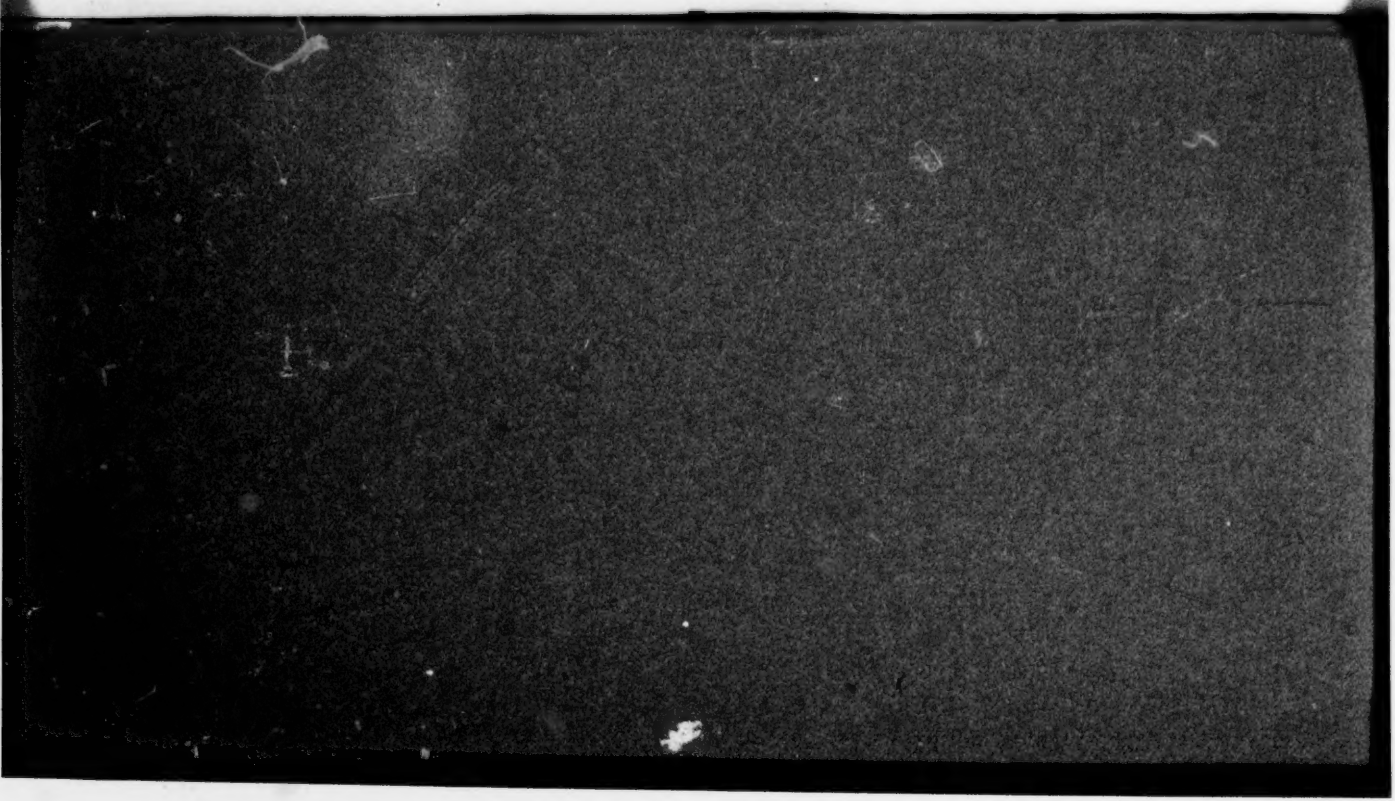
vs.

THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 12, 1915.

(24,775)



(24,775)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 494.

CHARLES C. PENNINGTON, PLAINTIFF IN ERROR,

vs.

THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print
Caption	*a*	1
Petition in error	1	1
Waiver of summons and entry of appearance	2	2
Transcript of record from the circuit court of Hamilton county.	3	2
Petition in error	3	2
Transcript of docket and journal entries in circuit court and court of appeals	4	3
Petition in superior court	5	3
Answer	7	4
Amended reply	9	5
Demurrer to amended reply	10	6
Transcript of docket and journal entries in the superior court	11	6
Clerk's return to writ of error	13	7
Petition for a writ of error assignment and prayer for reversal.	14	7
Order allowing writ of error	16	9
Writ of error	18	9
Citation and service	19	10
Præcipe for transcript of record	21	11
Bond on writ of error	22	12
Docket entries	23	14
Journal entries	24	16
Judgment	24	16
Certificate of lodgment	25	16
Clerk's certificate	26	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1915.

a Filed Jan. 28, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

Supreme Court of Ohio.

No. 14474.

CHARLES C. PENNINGTON, Plaintiff in Error,
versus
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Error to the Court of Appeals for Hamilton County.

RECORD.

Mallon & Vordenberg, Attorneys for Plaintiff in Error.
W. S. Little, Attorney for Defendant in Error.

1 Supreme Court of Ohio.

RECORD.

Petition in Error.

(Filed January 9, 1914.)

No. 14474.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Charles C. Pennington, plaintiff in error, says that at the November Term, A. D. 1913, of the Circuit Court and the Circuit Court of Appeals of Hamilton County, Ohio, in a certain proceeding numbered 5584 on the docket of said Court, the defendant in error, the Fourth National Bank of Cincinnati, Ohio, recovered a judgment by the consideration of said court against the plaintiff in error, in an action then pending therein, wherein said plaintiff in error was plaintiff in error, and defendant in error was defendant in error, to all of which this plaintiff in error excepted.

2 A Transcript of the Docket and Journal Entries in such cause duly certified, together with the original pleadings and papers are filed herewith.

And this plaintiff in error says that there is error in said record and pleadings in this, to-wit:

1. The Court of Common Pleas erred in sustaining the demurrer of defendant in error to the amended reply of the plaintiff in error.
2. The Circuit Court of Appeals erred in sustaining the judgment of the Court of Common Pleas and in rendering judgment in favor of defendant in error and against plaintiff in error.
3. Said judgment is contrary to law.
4. Other errors of law appearing on the record, to which plaintiff in error excepted.

Plaintiff in error therefore prays that the said judgment may be reversed, set aside and held for naught, and that judgment may be rendered in favor of plaintiff in error, and that he be restored to all things that he has lost by reason thereof, and for all other and proper orders and relief in the premises, and his costs herein.

MALLON & VORDENBERG.

Issuance and service of summons in error is hereby waived and appearance of defendant in error is hereby entered.

THE FOURTH NATIONAL BANK,
By W. S. LITTLE.

3 *Petition in Error.*

(Filed March 28, 1912.)

Circuit Court, Hamilton County, Ohio.

No. 5584.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Charles C. Pennington, plaintiff in error, says that at the October Term, A. D. 1911, of the Superior Court of Cincinnati, Hamilton County, Ohio, the defendant in error, the Fourth National Bank of Cincinnati, Ohio, recovered a judgment by the consideration of said Court against the plaintiff in error, in an action then pending therein, wherein said plaintiff in error was plaintiff and defendant in error was defendant—to all of which this plaintiff in error excepted.

A transcript of the docket and journal entries in such cause, together with the original pleadings and papers are filed herewith.

And this plaintiff in error says that there is error in said record and pleadings in this, to-wit:

1. The court erred in sustaining the demurrer of defendant in error to the amended reply of the plaintiff in error;

4 2. The Superior Court erred in rendering judgment in favor of defendant in error and against plaintiff in error on its answer in said cause;

3. Said judgment is contrary to law;
4. Other errors of law appearing on the record, to which plaintiff in error excepted.

Plaintiff in error therefore prays that said judgment may be reversed, set aside and held for nought, and that judgment may be rendered in favor of plaintiff in error, and that he be restored to all things that he has lost by reason thereof, and for all other and proper orders and relief in the premises, and his costs herein.

MALLON & VORDENBERG.

Issue and service of summons in error is hereby waived and appearance of defendant in error is hereby entered.

THE FOURTH NATIONAL BANK,
By W. S. LITTLE, *Attorney.*

Transcript of Docket and Journal Entries in Circuit Court and Court of Appeals.

(Filed in Supreme Court —.)

Petition in error, transcript and original papers filed March 28, 1912. Superior Court No. 54597.

1912, Mar. 28.—Waiver of summons in error and entry of appearance of defendant in error filed. (See Pet.)

5 1913, Nov. 12.—Min. 9: Judgment of affirmance at costs of plaintiff in error.

This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the Superior Court of Cincinnati, and was argued by counsel; on consideration whereof, the court finds there is no error apparent on the record in said proceedings and judgment.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is, affirmed; and that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

To all of which plaintiff in error excepts.

(Duly certified.)

Petition.

(Filed December 10, 1909.)

Superior Court of Cincinnati.

No. 54597.

CHARLES C. PENNINGTON, Plaintiff,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant.

The defendant is, and at all times hereinafter stated, was a corporation duly organized and existing under the laws of the United States.

6 For cause of action against defendant, plaintiff says that on the 1st day of September, 1908, plaintiff had on deposit in the bank of the defendant, the Fourth National Bank of Cincinnati, Ohio, the sum of $1,395.17, subject to any check he might draw thereon.

That on said day he drew a check on said defendant bank, requesting it to pay to the order of Walter B. Pennington $1,395.17.

That on the 5th day of September, 1908, and while said sum of money was still on deposit in said bank, said Walter B. Pennington presented said check, during banking hours, to the defendant bank, for payment, which was refused whereby plaintiff was compelled to pay the same. That since last mentioned day, said bank has honored a check made in favor of Jos. R. Peebles Sons Company, which reduced the amount so on deposit to $1,347.54.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $1,347.54, with interest from September 5, 1908, his damages claimed as above set forth, and for his costs herein.

MALLON & VORDENBERG,
Attorneys for Plaintiff.

(Duly verified.)

7

Answer.

(Filed January 8, 1910.)

Now comes the defendant, the Fourth National Bank, and for answer to the petition says that it admits the allegations therein contained, except as may be denied herein.

This defendant further says that on or about the 4th day of September, 1908, one Clara M. Pennington commenced an action in the Court of Common Pleas, of Hamilton County, Ohio, against the plaintiff, Charles C. Pennington, and this defendant, being cause No. 140831, wherein she prayed for a divorce, alimony, custody of children, injunction and for all proper relief; that on or about the 4th day of September, 1908, this defendant was served with summons in said cause, and with an order restraining it from paying out any money which it held belonging to the plaintiff, Charles C. Pennington; that on or about the 10th day of September, 1908, this defendant filed its answer in said cause, stating that it had an account upon its books in the name of Charles C. Pennington, with a credit balance of fourteen hundred and forty-five dollars and seventeen cents; that this defendant, from time to time during the pendency of said cause, by order of said Court of Common Pleas, paid from said credit balance certain sums of money, amounting in all to five hundred and fifty dollars; that during the

8 January term, 1909, of said court, a final decree was entered ordering among other things that the plaintiff herein "be forever divested of all and every claim, title or interest to the said sum of fourteen hundred and forty-five dollars and seventeen cents in possession of said bank," and this defendant was perpetually enjoined from paying any part of said sum on the order of Charles

C. Pennington, and this defendant was ordered by said court to pay the balance of said money, eight hundred and ninety-five dollars and seventeen cents, to Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony and attorney's fees therein decreed; and that this defendant, in compliance with said order of court, paid said balance of money, as in said order provided.

Defendant further says that said amount of fourteen hundred and forty-five dollars and seventeen cents included the amount of thirteen hundred and forty-seven dollars and fifty-four cents mentioned in the petition herein, and that this defendant did not on September 1st, 1908, or at any time since then, have any other money of the plaintiff on deposit.

Wherefore said defendant asks that it be hence dismissed with its costs.

THE FOURTH NATIONAL BANK,
By W. S. LITTLE, *Its Attorney.*

(Duly verified.)

9 *Amended Reply.*

(Filed by Leave April 7, 1911. Minute 109.)

Plaintiff by way of amended reply to the answer of the defendant admits that the proceedings in case No. 140831, Common Pleas Court, were had as alleged therein, but says that the alleged orders and judgment of the Court made in said cause were void, inoperative and of no effect, for the following reasons:

Said C. C. Pennington, during the pendency of said suit was not a resident of the state of Ohio, and defendant knew, or ought to have known that fact.

The return of summons by the Sheriff in said cause showed that said C. C. Pennington was "not found in said county."

An affidavit for service by publication was then made in said cause, which stated that the residence of said C. C. Pennington "was unknown and that service could not be had within the state of Ohio."

The publication of notice and proof thereof in said cause stated his "place of residence was unknown."

This plaintiff at no time submitted to the jurisdiction of the Court in said cause.

No summons was served upon him in said action, nor did he appear in said action voluntarily, or otherwise.

10 The court in said cause had no jurisdiction either of the person or property of this plaintiff, and hence could not render a valid judgment or make any valid orders against this plaintiff or order said bank to pay said money to any one but its owner, C. C. Pennington.

Plaintiff says that the payment of his money by the bank without his authority to others than this plaintiff was illegal and without authority of law, and thereby plaintiff has been deprived of his prop-

erty without due process of law in violation of the Constitution of the United States, and particularly of Section 1, Article XIV thereof.

Wherefore, plaintiff asks judgment as praved for in his petition.

MALLON & VORDENBERG,
Attorneys for Plaintiff.

(Duly verified.)

Demurrer to Amended Reply.

(Filed by Leave March 2, 1912. Minute 436.)

Now comes the Fourth National Bank and demurs to the amended reply, on the ground that on its face it is insufficient in law.

11 *Transcript of Docket and Journal Entries in Superior Court.*

(Filed in Circuit Court March 28, 1912.)

To December 20, 1909. Petition filed December 10, 1909. Action for money; amount claimed, $1,347.54, with interest from September 5, 1908, and costs.

1909, Dec. 10. Summons issued.

1909, Dec. 20. Summons returned endorsed: Received December 10, 1909, Henry W. Hamann, Sheriff. Cincinnati, December 15, 1909. Served the within named defendant, the Fourth National Bank of Cincinnati, Ohio, by delivering a true copy of this writ with all the endorsements thereon personally to C. Wilson, Vice-President thereof, no other chief officer being found in my county. Henry W. Hamann, Sheriff of Ham. Co., O., by Geo. Paul, Deputy. Sheriff's fees, $1.00.

1910, Jan. 8. Answer of defendant filed.

1910, Feb. 17. Min. 413: Leave given plaintiff to file reply.

1910, Feb. 17. Reply filed.

1911, Feb. 21. Demurrer to reply filed.

1911, Apr. 7. Min. 109: Leave given to file amended reply.

1911, Apr. 7. Amended reply filed.

1912, Mar. 2. Min. 436: Entry withdrawing demurrer to original reply.

12 Now comes the defendant and by leave of court withdraws his demurrer to the original reply heretofore filed herein.

1912, Mar. 2. Min. 436: Leave given to file demurrer to amended reply.

1912, Mar. 2. Demurrer to amended reply filed.

1912, Mar. 2. Min. 436: Entry sustaining demurrer to amended reply, and judgment for defendant and costs; plaintiff excepts.

This cause came on this day to be heard on the demurrer of the defendant to the amended reply herein, the court, on consideration thereof, sustains the same. And plaintiff not desiring to plead further, it is considered by the court that the defendant go hence without day, and recover from the plaintiff its costs herein expended.

To all of which the plaintiff excepts.

(Duly certified.)

13 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Ohio, in the City of Columbus, this 10th day of June, A. D. 1915.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

14 Supreme Court of Ohio.

No. 14474.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the plaintiff in error hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and order fixing the amount of a bond.

The petition of plaintiff, in the Superior Court of Cincinnati, Ohio, against the defendant The Fourth National Bank, prayed for the recovery of $1,347.54, with interest from September 5, 1908, which he claimed he had on deposit in said bank, the payment of which it refused on a check duly presented.

The defendant's answer alleged that Clara N. Pennington, on September 4, 1908, brought suit in the Common Pleas Court of Hamilton County, against said Charles C. Pennington for divorce, alimony, custody of children and an injunction, and she made the said bank a party defendant. On September 4, 1908, the bank was served with summons together with an order restraining it from paying out any money which it held belonging to Charles C. Pennington. From time to time during the divorce suit, the bank, by order of said Common Pleas Court, paid from the money it held belonging to Charles C. Pennington, the sum of Five hundred and fifty Dollars. During the January Term, 1909, a final decree was entered in said case ordering that Charles C. Pennington be forever divested of all and every claim, title or interest to the sum of One thousand four hundred and forty-five dollars and seventeen
15 cents ($1,445.17) held by the bank for him at the commencement of said divorce suit, and that the bank pay the balance

of said money to his wife, Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony and attorney's fees. The bank paid out the balance of said money in accordance with said decree.

The plaintiff replied admitting said proceedings were had, but complained that the alleged orders and judgment of the court made in said divorce case were void, for the following reasons, that—

"Said C. C. Pennington, during the pendency of said suit was not a resident of the state of Ohio, and defendant knew, or ought to have known that fact.

The return of summons by the sheriff in said cause showed that said C. C. Pennington was 'not found in said county.'

An affidavit for service by publication was then made in said cause, which stated that the residence of C. C. Pennington 'was unknown and that service could not be had within the state of Ohio.'

The publication of notice and proof thereof in said cause stated his 'place of residence was unknown.'

This plaintiff at no time submitted to the jurisdiction of the court in said cause.

No summons was served upon him in said action, nor did he appear in said action voluntarily, or otherwise.

The court in said cause had no jurisdiction either of the person or property of this plaintiff, and hence could not render a valid judgment or make any valid orders against this plaintiff or order said bank to pay said money to any one but its owner, C. C. Pennington.

Plaintiff says that the payment of his money by the bank without his authority to others than this plaintiff was illegal and without authority of law, and thereby plaintiff has been deprived of his property without due process of law in violation of the Constitution of the United States, and particularly of Section 1, Article XIV, thereof."

To this amended reply, said bank filed a demurrer, on the ground that on its face it was insufficient in law.

Said demurrer was sustained by said Court and thereupon there was a judgment in said case by said Court in favor of defendant and against your petitioner and dismissing plaintiff's action; whereupon plaintiff prosecuted error to the Supreme Court of the State of Ohio,
that being the highest Court of Law or Equity of said state in
16 which a decree or judgment could be had in said case, assigning therein as error the sustaining of said demurrer in said case by said Supreme Court and the judgment of said Court dismissing said case and in favor of said defendant.

Your petitioner, by the allegations of said amended reply, raised and presented a Federal question.

At the January Term, 1915, of the Supreme Court of the State of Ohio, the petition and the record came on to be heard in said Supreme Court; and on the 30 day of March, 1915, the said Supreme Court rendered its final judgment therein affirming the judgment of the Court below, namely—The Superior Court of Cincinnati, Ohio—

And assigning error therein, your petitioner says that in the record

and proceedings in the aforesaid case there is manifest error in this, to wit:

The Supreme Court of Ohio erred in holding and deciding that your petitioner was not deprived of his property without due process of law, as set forth in his said amended reply, and in holding that the proceedings set forth in said pleadings were valid. The validity of the proceedings set forth in said case was denied and drawn in question by your petitioner on the ground *that* their being repugnant to and in conflict with Article 14, Sec. 1 of the Constitution of the United States, which declares that no person shall be deprived of his property without due process of law.

For which errors the plaintiff in error prays that the said judgment of the Supreme Court of the State of Ohio be reversed and a judgment rendered in favor of plaintiff and for costs.

MALLON & VORDENBERG,
Attorneys for Charles C. Pennington.

STATE OF OHIO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Charles C. Pennington to The Fourth National Bank, in the sum of $200.00.

HUGH L. NICHOLS,
Chief Justice, Supreme Court of Ohio.

17 Dated May 28th, 1915.

[Endorsed:] No. 14474. Supreme Court of Ohio. Charles C. Pennington, Plaintiff in Error, vs. The Fourth National Bank of Cincinnati, Ohio, Defendant in Error. Petition for Writ of Error, Assignment and Prayer. Filed May 28, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Mallon & Vordenberg, Att'ys for Plaintiff in Error.

18 *Original Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you, or some of you, being the highest Court of law or equity of said State in which a decision could be had in a suit between Charles C. Pennington and The Fourth National Bank of Cincinnati, Ohio, wherein was drawn in question the validity of the proceedings of the Court of Common Pleas of Hamilton County, Ohio, and the proceedings in said above named case, as fully set forth in the record and proceedings in this Supreme Court of the State of Ohio, on the ground of their being repugnant to and

in conflict with the provisions of the Constitution of the United States and the amendments thereto, and said decision was in favor of the validity of said proceedings, a manifest error hath happened, to the great damage of the said Charles C. Pennington, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28 day of May, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Southern Dist. Ohio.]

B. E. DILLEY,
Clerk of the District Court of the United States of the Southern District of Ohio, Eastern Division.

Allowed by

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

[Endorsed:] 14474. Pennington vs. Fourth Nat'l Bank of Cin'ti, O. Writ of Error. Filed May 28, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

19 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Fourth National Bank of Cincinnati, Ohio, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court *Court* of the State of Ohio wherein Charles C. Pennington is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Hugh L. Nichols, Chief Justice of the

Supreme Court of the State of Ohio this 28 day of May, in the year of our Lord one thousand nine hundred and fifteen.

Eugene A. Scanlon is deputized to make service hereof.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Attest:
FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

20 On this 29th day of May, in the year of our Lord one thousand nine hundred and fifteen, personally appeared Eugene A. Scanlon before me, the subscriber, a Notary Public in and for Hamilton County, Ohio, and makes oath that he delivered a true copy of the within citation to The Fourth National Bank of Cincinnati, a corporation, by delivering the same to G. W. Williams, its Vice President, no other chief officer being found; also, on June 1, 1915, served said Bank by delivering a true copy of within citation to Charles E. Wilson personally, its President; also, on June 1, 1915, served W. S. Little, attorney for said Bank, by delivering to him a true copy of within citation.

EUGENE A. SCANLON.

Sworn to and subscribed the 1st day of June, A. D. 1915.
A. D. 1915.

[Notarial Seal, Hamilton Co., Ohio.]

HARRY W. VORDENBERG,
Notary Public in and for Hamilton County, Ohio.

[Endorsed:] Pennington vs. Bank. Citation and Return. Filed Jun- 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

21 Supreme Court of Ohio.

No. 14474.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Præcipe.

To the Clerk:

Prepare transcript of the entire copy of Record in the above case together with a copy of the opinion of the Court, if any.

MALLON & VORDENBERG,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed May 28, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

22 Supreme Court of Ohio.

No. 14474.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Duplicate.

Bond.

Know all men by these presents, That I, Charles C. Pennington, as principal and American Surety Company of New York as sureties, are held and firmly bound unto The Fourth National Bank of Cincinnati Ohio, its successors and assigns, in the sum of Two Hundred Dollars ($200.00), to be paid to the said The Fourth National Bank of Cincinnati, Ohio, its successors and assigns, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 28 day of May, 1915.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

CHARLES C. PENNINGTON,
By MALLON & VORDENBERG,
His Att'ys.
AMERICAN SURETY COMPANY OF NEW YORK.
By J. S. MOSSGROVE,
Resident Vice President.

[Seal American Surety Company of New York.]

Attest:
E. C. MORRIS,
Resident Ass't Sec'y.

Bond and sureties approved.

HUGH L. NICHOLS,
Chief Justice Supreme Court of Ohio.

22½ STATE OF OHIO,
County of Franklin, ss:

On this 28th day of May, A. D. 1915, personally appeared before me, J. S. Mossgrove, who being first duly sworn deposes and says that he is the Resident Vice President and representative for the American Surety Company of New York, a corporation, incorporated under the laws of the State of New York and doing business in the State of Ohio; that the seal affixed to the foregoing instrument is the corporation seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said J. S. Mossgrove acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal, Franklin County, Ohio.]

HAROLD W. GUITNER,
Notary Public, Franklin County, Ohio.

23

Docket Entries (*Minute Book* 32, *Page* 296).

Supreme Court of Ohio, January Term, 1914.

Attorneys.	Title of case.	Action.	Costs.	Paid by.
Mallon & Vordenberg, Cincinnati; No. 14474. W. S. Little, Cincinnati;	Charles C. Pennington vs. The Fourth National Bank of Cincinnati, Ohio.	Error to the Court of Appeals of Hamilton County.	Petition, $5.00. Printing Record, $9.00.	Mallon & Vordenberg. Mallon & Vordenberg.

O. A.

Memoranda of Pleadings Filed, Writs Issued, Judgments, Orders, and Decrees.

1914.

Jan. 9. Petition in Error, Waiver of Summons, Court of Appeals Transcript and Original Papers filed.

Jan. 29. Printed Record filed. Jan. 29. Proof of service filed.

" " Request for oral argument filed by Mallon & Vordenberg.

Apr. 6. Plaintiff's Printed Brief filed. Apr. 7. Proof of service filed.

Apr. 7. Printer's receipted bill filed.

June 5. Defendant's printed brief filed. June 5. Proof of service filed.

July 8. Plaintiff's Printed Reply brief filed. Mar. 18, 1915. Proof of service filed.

1915.

Mar. 15. Stipulation waiving oral argument filed.

Mar. 30. Judgment affirmed on authority of Benner v. Benner, 63 O. S. 220, and The Cleveland & Buffalo Transit Company v. Beeman, 81 O. S. 509. Journal 27, p. 74.

Apr. 6. Mandate issued.

" " Original Papers sent to Clerk.

May 28. Petition for Writ of Error, Assignment of Errors and prayer for reversal (allowed by Chief Justice Hugh L. Nichols) filed.

" " Writ of Error filed and allowed by Chief Justice Hugh L. Nichols.

" " Citation to defendant in error issued.

" " Bond in sum of $200.00 signed by Charles C. Pennington, by Mallon & Vordenberg, his att'ys, as principal, and by American Surety Co. of N. Y. as surety filed, and approved by Chief Justice Hugh L. Nichols.

" " Praecipe for transcript of entire record filed.

" " One copy of writ of error and one copy of petition, assignment and prayer lodged for Clerk of this Court, as allowed.

" " One copy of writ of error and one copy of petition, assignment and prayer lodged for Fourth Nat'l Bank of Cin'ti, O., as allowed.

Jun- 10. Citation returned and filed, endorsed, "On this 29th day of May, in the year of our Lord one thousand nine hundred and fifteen, personally appeared Eugene A. Scanlon before me, the subscriber, a Notary Public in and for Hamilton County, Ohio, and makes oath that he delivered a true copy of the within citation to The Fourth National Bank of Cincinnati, a corporation by delivering the same to G. W. Williams its Vice President, no other chief officer being found. Also on June 1, 1915, served said Bank by delivering a true copy of within citation to Charles E. Wilson personally its President. Also on June 1, 1915, served W. S. Little, Attorney for said Bank by delivering to him a true copy of within citation. Eugene A. Scanlon. Sworn to and subscribed the 1st day of June, A. D. 1915. Harry W. Vordenberg, Notary Public in and for Hamilton County, Ohio, (Seal)."

24

Journal Entries (*Journal* 27, *Page* 74).

Supreme Court of Ohio, January Term, A. D. 1915.

* * * * * * *

No. 14474.

CHARLES C. PENNINGTON
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI.

Error to the Court of Appeals of Hamilton County.

* * * * * * *

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the Judgment of the said Court of Appeals be and the same is hereby affirmed on authority of Benner v. Benner, 63 O. S. 220, and The Cleveland & Buffalo Transit Company v. Beeman, 81 O. S. 509, and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered, That a special mandate be sent to the Superior Court of Cincinnati, to carry this judgment into execution;

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry".

25 *Certificate of Lodgment.*

SUPREME COURT,
State of Ohio, ss:

I, Frank E. McKean, clerk of the said court, do hereby certify that there was lodged with me as such clerk on May 28th, 1915, in the matter of Charles C. Pennington versus The Fourth National Bank of Cincinnati, Ohio.

1. The original bond of which a copy is herein set forth.

2. Two copies of the Pet., Assgmt. and prayer, and 2 copies of writ of error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Columbus, Ohio, this May 28th, 1915.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio.

26 Supreme Court of the State of Ohio.

CHARLES C. PENNINGTON, Plaintiff in Error,
vs.
THE FOURTH NATIONAL BANK OF CINCINNATI, OHIO, Defendant in Error.

Error to the Court of Appeals of Hamilton County.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors and prayer for reversal, order allowing writ, writ of error, citation and return of service thereon, and praecipe for transcript are the original papers filed in this Court in the above entitled case; that the foregoing copy of the bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Court and used in the consideration of said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court; and that no opinion was rendered by the Court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 10th day of June, A. D. 1915.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 24,775. Ohio Supreme Court. Term No. 494. Charles C. Pennington, plaintiff in error, vs. The Fourth National Bank of Cincinnati, Ohio. Filed June 12th, 1915. File No. 24,775.

Supreme Court of the United States.

CHARLES C. PENNINGTON,
Plaintiff in Error,

No. 494. *vs.*

THE FOURTH NATIONAL BANK OF CINCINATI, OHIO,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, as plaintiff, brought suit (petition on page 2 of Record) against the defendant in error, The Fourth National Bank, in the Superior Court of Cincinnati, Ohio, to recover $1,347.54, with interest from September 5, 1908, payment on a check of plaintiff, duly presented, in such amount being refused although he had that amount to his credit on deposit with said bank.

Said bank, by way of answer (Record, page 4), alleged that Clara N. Pennington, on September 4, 1908, brought suit in the Common Pleas Court of Hamilton County, against said Charles C. Pennington for divorce,

alimony, custody of children and an injunction, and she made the said bank a party defendant. On September 4, 1908, the bank was served with summons together with an order restraining it from paying out any money which it held belonging to Charles C. Pennington. From time to time during the divorce suit, the bank, by order of said Common Pleas Court, paid from the money it held belonging to Charles C. Pennington, the sum of $550. During the January Term, 1909, a final decree was entered in said case ordering that Charles C. Pennington be forever divested of all and every claim, title or interest to the sum of $1,445.17 held by the bank for him at the commencement of said divorce suit, and that the bank pay the balance of said money to his wife, Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony and attorney's fees. The bank paid out the balance of said money in accordance with said decree.

Said Charles C. Pennington, by way of amended reply to said answer (see Record, page 5) admitted said proceedings were had, but complained that the alleged orders and judgment of the court made in said divorce case were void, for the following reasons, that—

> "Said C. C. Pennington, during the pendency of said suit was not a resident of the state of Ohio, and defendant knew, or ought to have known that fact.
>
> "The return of summons by the sheriff in said cause showed that said C. C. Pennington was 'not found in said county.'
>
> "An affidavit for service by publication was then made in said cause, which stated that the residence of C. C. Pennington 'was unknown and that service could not be had within the state of Ohio.'

"The publication of notice and proof thereof in said cause stated his 'place of residence was unknown.'

"This plaintiff at no time submitted to the jurisdiction of the court in said cause.

"No summons was served upon him in said action, nor did he appear in said action voluntarily, or otherwise.

"The court in said cause had no jurisdiction either of the person or property of this plaintoff, and hence could not render a valid judgment or make any valid orders against this plaintiff or order said bank to pay said money to any one but its owner, C. C. Pennington.

"Plaintiff says that the payment of his money by the bank without his authority to others than this plaintiff was illegal and without authority of law, and thereby plaintiff has been deprived of his property without due process of law in violation of the Constitution of the United States, and particularly of Section 1, Article XIV, thereof."

To this amended reply, said bank filed a demurrer (Record, page 6), on the ground that it was insufficient in law.

Thus the facts as set forth in the pleadings, and as substantially stated above, are admitted by all parties.

The Superior Court sustained said demurrer; the Circuit Court affirmed the judgment of the Superior Court.

The Supreme Court of Ohio affirmed the judgment of the Circuit Court without report (Record, page 16), upon the authority of *Benner* v. *Benner*, 63 O. S., 220, and *The Cleveland & Buffalo Transit Co.* v. *Beeman*, 81 O. S., 509 (unreported).

The plaintiff in error is asking for a reversal of the judgments of the Superior Court, the Circuit Court and the Supreme Court of the State of Ohio.

SPECIFICATION OF ERROR.

The error relied upon is the affirmation by the Supreme Court of the State of Ohio of the judgment of the lower courts sustaining the demurrer to the amended reply whereby such court held that a decree of the Court of Common Pleas of Hamilton County, Ohio, in a suit for divorce and alimony, against a defendant non-resident of the State, upon whom there was no personal service of summons and who did not enter his appearance in person nor by attorney, which ordered the bank wherein said defendant had a deposit to his personal credit to pay the defendant's money to the wife on account of alimony and attorney's fees, was valid.

Plaintiff in error claimed that such decree or order of court was without validity, and The Fourth National Bank (defendant in error) was not thereby justified in paying the money or credit of the husband on deposit to the wife, for such judicial proceeding was in violation of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deprive any person of property without due process of law.

THE LAW.

I.

Suit for Alimony is Strictly a Proceeding in Personam.

If a plaintiff seeks to assert some interest in land or other tangible property as against a non-resident defendant he may proceed directly against the land.

Or if he seeks to establish a debt he can by attachment bring the property (tangible property) of defendant under the control of the court, to respond to the debt, unless the defendant puts in an appearance and disproves the debt.

But the right must exist or be claimed to exist, before attachment can be had. The defendant must be, or must be alleged to be indebted to plaintiff, for only on the ground of satisfying an existing debt can plaintiff cause defendant's property to be seized.

> "If there is no appearance of the defendant and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." *Pennoyer* v. *Neff*, 95 U. S., 725.
>
> "Service of process by publication * * * where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*."
>
> *Pennoyer* v. *Neff*, 95 U. S., 733.

In *Minor on Conflict of Laws*, page 191, Section 88, we find the statement—

> "But a decree for the costs of a divorce suit, or a decree for alimony, is a decree strictly *in personam*, since the object is to fasten upon the defendant a general pecuniary liability, not to affect the status."

"The obligation of a husband to support his wife is personal and therefore a decree of alimony against a non-resident defendant is *in personam* and void, unless he has appeared, either in person or by attorney, or has been personally served with process within the territorial jurisdiction of the court."

14 Cyc., 745.

"A decree in divorce is *in rem* and, therefore, justified by jurisdiction over the *res* alone, only in so far as it affects the marital status. If it goes further than this, and assumes to adjudicate matters collateral or incidental to the dissolution of the marriage, the proceeding becomes one *in personam*, and no personal liability can be imposed upon the defendant unless there is jurisdiction of his person acquired by proper service of process. All the cases which recognize the jurisdiction of the state to determine the marital status of its own citizens, although one of the parties lives in another state, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status of the marriage relation.

"On the same principle, when the defendant in divorce, is a non-resident and is not personally served with the process within the state, or has not voluntarily submitted himself to the jurisdiction of the court, a decree awarding alimony has no extra-territorial validity, for, to that extent, it is purely a personal judgment."

2 *Bishop on Marriage and Divorce*, Section 9.

"That the decree in the divorce suit, in so far as it purported to be a personal decree against the defendant for alimony and costs, is void, can admit of no doubt. In the absence of per-

sonal service upon the defendant within the jurisdiction of the court, no court has power to render a judgment *in personam* which can be the subject of an action or the basis of an execution. To render a valid judgment, a court must obtain jurisdiction either of the person or property of the defendant within its jurisdiction."

Bunnell v. *Bunnell*, 25 Fed. Rep., 216.

"Alimony—It exists only by judicial decree. Therefore, by all opinions, it can not be validly awarded in a mere ex parte divorce suit *in rem*, where the non-appearing defendant's domicile is in another state. If he dwells in the same state, a statute may, according to the Indiana case, authorize a decree for alimony against him on constructive notice. If in another state it can not, except when he appears and submits to the jurisdiction, then it can."

2 Bishop on Marriage, D. & S., Section 9.

This principle is elementary and has never been disputed.

The judgment for alimony and costs against the non-resident defendant being utterly void, no order of the court to carry such judgment into effect is of the least force.

The Supreme Court of Ohio in affirming the decision of the lower courts, held that the decree of the trial court which divested the defendant in a suit for divorce and alimony of all title to the deposit credit which he had in the bank and ordered the bank to pay over the amount of the deposit to the plaintiff on account of alimony was valid, although no attempt had been made to attach or garnishee said money or credit nor in any way to subject it to the jurisdiction of the court. The only order con-

cerning such credit was one restraining the bank from paying money to the defendant, which was, we claim, without validity and moreover purported to be operative only in case a personal judgment for alimony should be obtained, but no such judgment was ever obtained.

The Supreme Court of Ohio decided the case upon the authority of *Benner* v. *Benner*, 63 O. S., 224.

This case and one other, *Wesner* v. *O'Brien*, 56 Kans., 724 ,contrary to the current of authority, hold that under certain statutes the court may allow lands situated in the state to be appropriated to the support of the wife, in the nature of alimony.

These two cases do not for a moment question the proposition that a decree for alimony is without effect against a non-resident, that no personal judgment can be rendered without service; on the contrary, the court says in *Benner* v. *Benner*, 63 O. S., 220, on page 226:

> "The plaintiff in her action below, did not seek, nor obtain, a personal judgment against the defendant. She and her child were residents of the county in which her suit was brought. The specific property she asked to have subjected to her support was situated in that county, and she sought no other relief than its appropriation, or such part of it as might be necessary for that purpose, in fulfillment of the defendant's obligation to her in that behalf. The action and judgment were substantially *in rem*, in the sense that their direct object was to reach and dispose of property within the jurisdiction of the court."

Also, page 224:

> "If the action below was merely one *in personam*, the judgment can not be maintained;

> for, in such an action the court could acquire no jurisdiction to render judgment without personal service on the defendant, or appearance by him in the action. But if it may properly be regarded as an action *in rem*, the court could undoubtedly obtain jurisdiction, by constructive service, to appropriate the property of the defendant, situated in the county where the action was brought, to the purposes of the action, though it could render no personal judgment on which a general execution could issue, or an action against him be maintained."

These two cases do hold however, that under certain conditions the land of the defendant may be brought within the control of the court in what may be called substantially a proceeding *in rem*, by action under the statutes for the appropriation of a non-reident's property. To accomplish this, the land must be specifically described in the petition and other provisions followed, and this upon the ground mainly that the wife has an inchoate right of dower in the land, "which possessed the element of property to such a degree that she could maintain an action during the life of her husband for its protection and for relief from fraudulent alienation by her husband." *Wesner* v. *O'Brien*, 56 Kans., 728.

We can see how the court might view a porceeding to appropriate some specific real estate within its jurisdiction to the support of the wife in lieu of alimony, as in the nature of a proceeding *in rem*, although the weight of authority is so overwhelmingly the other way.

But how does this affect the case at bar? The Benner case holds that if the wife had sought to obtain a personal judgment for alimony such judgment would have been void.

By no loose definition of a proceeding *in rem*, can money, much less a bank credit, be made the subject of such proceeding. Before having a proceeding *in rem*, you must have some definite *res*, the status of which it is sought to establish.

The Supreme Court of Ohio held this most clearly in *Cross* v. *Armstrong*, 44 O. S., 613, in which case it was held that money can not be a *res*, even where it was paid into court under an interpleader.

The money is, to be sure, the thing contended for, but the action is to determine the rights of parties, not the *status* of the particular money. There is no particular money, even if it is wrapped up and marked. The controversy does not concern the status of that money *in specie;* any other money will do as well.

We ask the court to read from the beginning of the last paragraph on page 623 to the end of first paragraph, page 626 (44 O. S.), and it will appear most clearly that this money (not even money only a bank credit) lying in the Fourth National Bank could not possibly be made the subject of a proceeding *in rem*, and how the case of *Benner* v. *Benner*, 63 O. S., 220, which holds (against weight of authority) that land may be subjected to appropriation for or rather in lieu of alimony, without personal service on a non-resident, does not for one moment suggest that anything but land can be dealt with in a proceeding in the nature of a proceeding *in rem*.

But in the case at bar, there was not even any attempt made to seize or appropriate this money or credit; but entire reliance was placed upon the proceeding strictly *in personam* against the defendant, who was not served and did not appear.

When alimony is prayed for, as in the case of *Pennington* v. *Pennington* (which was not done in the Benner case),

the action becomes *in personam*, and unless jurisdiction is obtained of the person of the defendant, neither he nor his property can be affected by such decree.

A proceeding *in personam* without personal service is a self-contradictory phrase.

II.

A Proceeding Quasi in Rem, Such as Attachment, Can be Employed Only as a Process to Compel the Payment of a Debt.

In the case at bar there was no proceeding *in rem*, for there was no attempted appropriation of specific property of defendant. There was no proceeding *quasi in rem* for there was no debt alleged, no atachment issued. The only order of the court was an injunction restraining the bank from paying to the defendant the amount of money due him. The only process was an attempt to make the bank hold the money until a debt could be established, *i. e.*, until alimony could be decreed, but as no personal service upon defendant was ever obtained; alimony could be not decreed. If the court could restrain payment of the money until the debt should be established, it could not direct the payment of that money in satisfaction of a debt which never came into existence.

Joseph Henry Beale in an able article in 27 Harvard Law Review, page 107, considers the distinction between proceedings *in rem*, *quasi in rem* and attachment or garnishment, where the principal defendant is without the jurisdiction.

He says, page 118:

> "In short, the original conception of garnishment as a proceeding based on jurisdiction *in rem* over a thing has been superseded by a conception of garnishment as a transitory personal action against the garnishee."

Much less can an injunction against the bank restraining the disposition of a bank credit partake of the nature of a proceeding *in rem*.

III.

There Can be no Proceeding in Rem Against a Bank Credit.

Mr. Beale says:

> "The jurisdiction *in rem* depends upon control of the thing at the time the litigation is begun" (p. 108) * * * "Since the jurisdiction is in reality a jurisdiction over the thing and since therefore no judgment against the person that he owes a debt may effectually be granted, the proceeding must in some way be brought against the thing and not against the person." (p. 109.)
>
> "The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. * * * In order to control the relation the court must have the power to control both parties to it." (p. 115.)
>
> "The notion that garnishment is an ordinary action against the garnishee in combination with another personal action, and action against the principal debtor, has led the courts gradually to decide that garnishment proceedings

> will lie in any place in which personal jurisdiction may be obtained over the garnishee." (p. 118.)

The service of the bank with an injunction was not even a garnishment, but it was nearer a garnishment than anything else in the nature of an attempt to appropriate specific property.

In *Benner* v. *Benner*, 63 O. S., 220, the court held that the real estate of the defendant could be subjected to the wife's right of support, first, because the specific piece of real estate was described in the petition and its appropriation prayed for, *i. e.*, the proceeding was *in rem;* and second, that there was a seizure of the specific property which brought it within the control of the court.

In the case at bar, there is no real estate, there is no tangible property, there is only a chose in action which has no situs and can therefore not be within the jurisdiction. The proceeding does not even purport to be *in rem*, nor even *quasi in rem*, such as attachment. Nor yet again is a garnishment attempted.

Pennington, a non-resident of the State of Ohio is sued by his wife for divorce and alimony. He was not personally served with summons, and he did not personally nor by attorney enter his appearance in said suit. A decree of divorce could be granted. A judgment for alimony could not be rendered. When the court decreed that the bank should pay the money of Pennington it held on deposit subject to his check, to his wife on account of alimony, such portion of the decree was void.

> "Since the adption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a Court of justice

to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due procees of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Pennoyer v. *Neff*, 95 U. S., 714-733.

Respectfully submitted,

MALLON & VORDENBERG,

Attorneys for Plaintiff in Error.

GUY W. MALLON,

Of Counsel.

FILE COPY.

FILED
JAN 8 1917
JAMES D. MAHER
CLERK

No. [redacted] 147

Supreme Court of the United States.

CHARLES C. PENNINGTON,
Plaintiff in Error,

against

THE FOURTH NATIONAL BANK, OF CINCINNATI, OHIO,
Defendant in Error.

Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

W. S. LITTLE,
Attorney for Defendant in Error.

C. B. WILBY,
Of Counsel for Defendant in Error.

COURT INDEX PRESS, 646-650 Main Street, Cincinnati, O., January, 1917.

Supreme Court of the United States.

No. 494.

CHARLES C. PENNINGTON,
Plaintiff in Error,
Against

THE FOURTH NATIONAL BANK, OF CINCINNATI, O.,
Defendant in Error.

Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

Clara M. Pennington, on September 4th, 1908, brought suit in the Common Pleas Court of Hamilton County, Ohio, against plaintiff in error, Charles C. Pennington, for divorce, alimony, custody of children and injunction, and she made the defendant in error, The Fourth National Bank, of Cincinnati, a party defendant.

On September 4th, 1908, the Fourth National Bank was served with summons, together with an order restraining it from paying out any money which it held belonging to plaintiff in error, except as ordered by the Court, which restraining order was afterwards made perpetual.

From time to time during the suit the defendant in error, the Fourth National Bank, by order of said Court of Common Pleas, paid from the money it held belonging to the plaintiff in error, the sum of five hundred and fifty dollars.

During the January term, 1909, of said Court of Common Pleas, a final decree was entered in said case ordering that the plaintiff in error, Charles C. Pennington, be forever divested of all and every claim, title or interest to the sum of fourteen hundred and forty-five dollars and seventeen cents held by defendant in error, the Fourth National Bank, for said Charles C. Pennington at the commencement of the suit, and that the Fourth National Bank pay the balance of said money to Clara M. Pennington, or to Eugene C. Pociey, her attorney, on account of alimony, maintenance of children and attorney's fees. The defendant in error paid out the balance of said money in accordance with said decree.

Plaintiff in error was not, at the time of the commencement of said suit, a resident of the state of Ohio; he was not personally served with summons, and he did not personally or by attorney, enter his appearance in said suit. Service was made upon him by publication, in accordance with the statutes in such cases made and provided.

Plaintiff in error is now seeking to recover the full amount of money deposited by him with the defendant in error and by the defendant in error paid out under order of court as aforesaid.

Plaintiff in error brought suit in the Superior Court of Cincinnati to recover from the defendant in error the full amount of money deposited by said plaintiff in error in said bank and by said bank paid out under orders of the Common Pleas Court of Hamilton County, Ohio. See petition, page 3 of the record.

Defendant in error filed its answer setting up facts substantially as above. See answer, page 4 of the record.

Plaintiff in error filed an amended reply to said answer. See amended reply, page 5 of the record.

Defendant in error demurred to said amended reply. See demurrer, page 6 of the record.

The Superior Court sustained the demurrer and rendered judgment for the defendant in error.

The Circuit Court affirmed the Superior Court; the Supreme Court of Ohio affirmed the judgment of the Circuit Court without report (see Journal Entry, page 16 of Record) upon the authority of *Benner* v. *Benner*, 63 O. S., 220, and *The Cleveland & Buffalo Transit Company* v. *Beeman*, 81 O. S., 509; and plaintiff in error is now seeking a reversal of the judgments of the lower courts.

THE QUESTION.

In a divorce suit in the state of Ohio, can money or a bank credit of a non-resident defendant be appropriated in payment of alimony, maintenance of minor children and costs, where the court at the commencement of said suit obtains control of said property by means of an injunction, and where the non-resident defendant is duly served by publication but is not personally served, and does not in any way enter his appearance in said suit?

THE LAW.

I.

WHERE DEFENDANT'S PROPERTY IS BROUGHT UNDER CONTROL OF THE COURT WHEN ACTION IS COMMENCED, A SUIT FOR ALIMONY TO THE EXTENT OF SAID PROPERTY IS SUBSTANTIALLY A SUIT IN REM.

Much space is taken up in many legal works in the attempt to define and distinguish between proceedings *in*

personam and proceedings *in rem*. The clearest and most concise statement which I am able to find concerning these proceedings is as follows:

> "The purpose of a proceeding *in personam*, is to impose, through the judgment or decree of the court whose aid is invoked, some responsibility or liability directly upon the person of the defendant. Of this character are criminal prosecutions, suits to compel a defendant to perform some specific act, or actions to fasten a general pecuniary liability upon him. A proceeding *in rem*, on the other hand, is aimed not at the person of the defendant, but at his property or some other thing within the power and jurisdiction of the court."
>
> *Minor on Conflict of Laws*, page 184, Section 85.

In the light of these definitions, was the decree now in question, granting alimony, maintenance of children and costs, a decree *in personam* or a decree *in rem?*

> "With regard to so much of the decree as relates to the costs of the suit and alimony of the wife it is to be observed that, so far as the court undertakes to decree against the defendant for a sum of money, the decree is a proceeding *in personam*. It seeks to fasten upon the defendant a general pecuniary liability. Hence, as in the case of other proceedings, *in personam*, no exterritorial force will be given the court's decree in this respect unless the defendant is within the court's jurisdiction, either by voluntary appearance or by personal service of process there. * * *
>
> "But if a defendant is a non-resident, it is proper, even upon an order of publication, without personal service or appearance, to provide for the seizure and appropriation of the defendant's property within the state, to make good the costs or alimony decree; for to the extent of the of the property thus seized the decree would cease

to be *in personam*, and would become a decree *in rem*. But any part of the personal liability imposed by the decree in excess of the value of such property, would still be *in personam* only, and must conform to the requirements for such proceedings, touching the notice to be given the defendant, or else it will be void both exterritorily and intra-territorily."

Minor on Conflict of Laws, page 207, Section 95.

The decree in question merely ordered the money or bank credit, then under control of the court, to be applied in payment of alimony and costs. It was then in view of the foregoing statement, a proceeding *in rem*. The rule that property of a non-resident may be seized and appropriated in an action *in rem* is well settled.

"Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have assented to in advance as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or effecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the state, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

Pennoyer v. *Neff*, 95 U. S., 714, at pages 733 and 734.

"So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident has no property in the state, there is nothing upon which the tribunals can adjudicate.

"These views are not new. They have been frequently expressed, with more or less distinctness,

in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus in *Picquet v. Swan*, 5 Mass., 35, Mr. Justice Story said:

"'Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principals, be deemed only to bind him to the extent of such property, and can not have the effect of a conclusive judgment in personam, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice*.'"

Pennoyer v. *Neff*, 95 U. S., 714, at 723.

I respectfully submit that the question involved in this case appears to be fully answered in Ohio by the case of

Benner v. *Benner*, 63 O. S., 220.

The syllabi of that case are as follows:

"1. Service by publication is authorized by Section 5048 of the Revised Statutes, in an action by a wife for alimony and support of her child against the husband who deserted his family and became a non-resident of the state, where the only relief sought is the appropriation of real property of the husband situated in the county where the action is brought to the payment of the amount that should be allowed for such alimony and support.

"2. Such an action is substantially one *in rem*, and the court has jurisdiction at its commence-

ment to grant a preliminary injunction preventing the disposition of the property by the defendant pending the suit, and, on completion of the service by publication to decree the relief sought."

A personal decree or judgment for alimony, based upon constructive service, is valid as against property of a non-resident husband, which may be found within the jurisdiction of the court, specifically proceeded against in the divorce proceeding, and described in the petition for divorce; and such a judgment or decree may be satisfied therefrom, such a proceeding being *in rem*.

Harshberger v. *Harshberger*, 26 Iowa, 503.
Twing v. *O'Meara*, 59 Iowa, 326.
Wesner v. *O'Brien*, 56 Kan., 724.
Thurston v. *Thurston*, 58 Minn., 279.
Bailey v. *Bailey*, 127 N. C., 474.

II.

Money Or a Bank Credit Can Be the Subject Of a Proceeding in Rem.

Plaintiff in error contends that money or a bank credit can not be made the subject of a proceeding *in rem* and in support of this proposition cites *Cross* v. *Armstrong*, 44 O. S., 613. Careful reading of that part of the opinion referred to in plaintiff's brief and of the second paragraph on page 626, shows that the court merely decided that an action *in personam* could not, by the mere act of paying money into court and of filing an interpleader bringing in a non-resident as a party defendant, be changed into an action *in rem*. It is nowhere decided in that case that money or a bank credit can not be a *res*. In that case the money or credit was not seized by the court at the begin-

ning of the action, nor did the court in any way attempt to control the same, and the original action was one *in personam* against the Insurance Company.

It is well settled by the case of *Pennoyer* v. *Neff, supra,* that an action *in personam* can not, after its commencement, be changed into an action *in rem,* and this is the only point decided by the Supreme Court of Ohio in the case of *Cross* v. *Armstrong, supra.*

Plaintiff in error also relies upon the fact that in all the cases cited the property appropriated to the payment of alimony and costs was real estate.

An action *in rem* means a suit against a thing, no matter what kind, so long as it is capable of being seized by or controlled under process of courts.

The proceeding in question in this case is similar to a proceeding in attachment on the ground of non-residence, and certainly no one will deny that personal property can be seized in attachment suits. No distinction has been drawn between personal and real property in such cases, and correspondingly none should be drawn in cases such as the one in question.

Mr. Justice Field in delivering the opinion in *Pennoyer* v. *Neff, supra,* says on page 723:

> "Every state owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."

III.

Intangible Property Can Be Controlled By Injunction Against Its Custodian.

The Circuit Court of Cuyahoga County in *Cleveland & Buffalo Transit Company* v. *Kathryn L. Beeman,* and five

other cases (12 Ohio Circuit Court Reports [New Series], 460), affirmed by the Supreme Court of Ohio without report (on authority of *Benner* v. *Benner*, 63 Ohio State, 220), 81 Ohio State, 509, hold that:

> "1. An injunction against a custodian of intangible property gives to the court such control of the property as authorizes a decree transferring the title from the owner of the property before the injunction issued to another party to the suit who has been duly served with summons.
>
> "2. In an action by a wife for alimony, the fact that the husband was served by publication only does not render invalid an order awarding to the wife stocks in corporations for profit which have been brought into the action as defendants and enjoined against a transfer of the stock."

The court, Marvin, J., deciding the case said:

> "This case (No. 4258), together with the cases following up to and including number 4263, all raise the same questions and the determination of one is the determination of all.
>
> "Suit was brought in the Court of Common Pleas by Kathryn L. Beeman against her husband, Lester A. Beeman, for a divorce and alimony. Later, the prayer for divorce was abandoned and the case prosecuted for alimony alone. The defendant in that action, Lester A. Beeman, was a nonresident of the state of Ohio at the time the action was begun, and the only service had upon him was the constructive service by publication as provided for in the statute.
>
> "Each of the several plaintiffs in error in these cases is a corporation for profit. When the suit was begun in the Court of Common Pleas, Lester A. Beeman was a stockholder in each of these corporations, and each of the corporations was made a defendant in that action, and each was served with summons.

"On the motion of the plaintiff in that action a restraining order was allowed against each of these corporations, forbidding the transfer of any of the stock standing in the name of Lester A. Beeman, on their books, to any person. Upon final hearing the court awarded all of the stock standing in the name of Lester A. Beeman in these several corporations to Kathryn L. Beeman, as alimony, and ordered each of said corporations to deliver to the said Kathryn L. Beeman the original certificatees for such stock, and in case of the inability of said corporations, or any one of them, or the refusal of any one of them to deliver such certificates, that the decree of the court should operate as a conveyance of the several shares of stock in each of the corporations to the said Kathryn L. Beeman. To this judgment and order of the court error is prosecuted here, and a carefully prepared brief is furnished in behalf of the several plaintiffs in error, contending that the judgment was erroneous, and giving many plausible reasons for such contention. But whatever doubt might exist in our minds (were it not for the case of *Benner* v. *Benner*, 63 Ohio St., 220), is resolved by the judgment in that case in favor of the defendant in error.

"The argument in brief on behalf of the plaintiff in error is that as no personal service was made upon the defendant, Lester A. Beeman, no personal judgment could be rendered against him for alimony, and that the only way in which, in such case, his property could be reached is by such proceedings as puts the property in the custody of the court, and makes the case to that extent a proceeding *in rem* only, and that an injunction allowed against the custodian of such property (for the several corporations are the custodians of the stock of the several stockholders, see *Bank* v. *Towle Mfg. Co.*, 67 Ohio St., 306), is not such tak-

ing of the property by the court as will authorize a decree that the ownership of the property be transferred from the owner of said stock before the injunction, to another party in the suit.

"In the case of *Benner* v. *Benner, supra,* nothing was done to take the property of the defendant in that action into the custody of the court except the allowance of an injunction against the defendant prohibiting him from disposing of his property. The defendant in that action was a non-resident and there was no service other than constructive service by publication upon him. No injunction was allowed against anybody but him. True, the property there was real estate situated within the jurisdiction of the court. Here the property is intangible, but it has a situs and that situs is where the custodian of the property is, to-wit, the corporation. See the opinion in *Bank* v. *Mfg. Co.*, 67 Ohio St., 314, *supra.*

"The distinction between the case of *Benner* v. *Benner, supra,* and the present case, sought to be shown in the brief of plaintiffs in error, fails to convince us that the principle in that case must not apply to this. Indeed, the reason for its application here seems stronger than its application in that case, for each of parties here enjoined by the order of the court was actually served with summons in the action, while the property was in the possession and under the control of the corporations and we reach the conclusion, therefore, that the judgment of the Court of Common Pleas was right and in each case of the several cases the judgment is affirmed."

In the case at bar the Common Pleas Court by injunction, issued at the commencement of the action, obtained control over the money or deposit in The Fourth National Bank. The action from its inception was one *in rem*, and no attempt was made by the court to establish a general pecuniary liability upon the plaintiff.

The decree of the court was valid under the rule laid down in the case of *Pennoyer v. Neff, supra,* and was in accordance with the decisions of our own Supreme Court in

Benner v. Benner, 63 O. S., 220.
Transit Co. v. *Beeman,* 12 O.C.C.(N.S.), 460 (affirmed, 81 O. S., 509).

IV.

Analysis of Citations in Brief of Plaintiff in Error.

In the brief of plaintiff in error, filed herein, a number of citations are made which consist of extracts from text books and reports. In two cases these extracts are followed in the original by statements which materially qualify them. The following is quoted from plaintiff's brief:

> "The obligation of a husband to support his wife is personal, and therefore a decree of alimony against a non-resident defendant is *in personam* and void, unless he has appeared, either in person or by attorney, or has been personally served with process within the territorial jurisdiction of the court."
>
> 14 Cyc., 745.

In the original, the next sentence after the above, and in the same paragraph, reads as follows:

> "It has been held, however, that property within the jurisdiction of the court may be subjected to a decree granting alimony against a non-resident defendant who has been constructively served with process in a divorce suit."

Then again, we find the following quotation in plaintiff's brief:

> "That the decree in the divorce suit, in so far as it purported to be a personal decree against the defendant for alimony and costs, is void, can admit of no doubt. In the absence of personal service upon the defendant within the jurisdiction of the court, no court has power to render a judgment *in personam* which can be the subject of an action or the basis of an execution. To render a valid judgment, a court must obtain jurisdiction either of the person or property of the defendant within its jurisdiction."
>
> *Bunnell* v. *Bunnell*, 25 Federal Reports, 216.

which in turn is followed in the same paragraph in the original by the following:

> "If the jurisdiction of the person be obtained by personal service of process, the judgment will be valid the world over. If jurisdiction be obtained by seizure of property the judgment will be valid only as it respects that property, and within the jurisdiction of the court rendering it."

In brief of plaintiff in error an attempt is made to distinguish between the action out of which this case grew and a proceeding in attachment for the satisfaction of a debt. It is said that in the case of a proceeding in attachment, a debt must exist or be claimed to exist. However, in a proceeding in attachment, the court must, after the attachment is made, find that the debt does exist and fix the amount, before it can order the defendant's property appropriated to its satisfaction. In a suit for divorce and alimony brought by a wife, the allegations setting forth the marriage contract necessarily show a right on the part of the wife and children to be supported by the husband

and the court in determining a wife's right to said support and in fixing the amount of alimony, is doing no more than the court does in an attachment case, when it finds that there is a debt and fixes its amount. In either case, if the defendant is not personally served or does not enter his appearance, the judgment of the courts is only binding to the extent of the property of the defendant which was under the control of the court from the beginning of the action.

It is said that the bank credit with which we are concerned in this case had no situs and, therefore, could not be the subject of a proceeding *in rem*. So far as the defendant in error was concerned this bank credit was a debt owned by it to the plaintiff in error and as such was subject to the law in regard to the situs of debts. Upon this subject Mr. Justice McKenna, speaking for the Court, said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney* v. *Buford & George Mfg. Co.*, 72 Fed. Rep., 32; Conflict of Laws, §549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistance upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Chicago, Rock Island & Pacific Railway Company v. Sturm, 174 U. S., 710, at pages 715 and 716.

For a very logical discussion of the subject of the situs of debts the Court is referred to *Minor on Conflict of Laws*, Section 125.

I respectfully submit that the judgments of the Superior Court of Cincinnati, the Circuit Court of Hamilton County, and the Supreme Court of Ohio, be affirmed.

Respectfully submitted,

W. S. LITTLE,
Attorney for Defendant in Error.

C. B. WILBY,
of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 147.—October Term, 1916.

Charles C. Pennington, Plaintiff in Error, *vs.* The Fourth National Bank of Cincinnati, Ohio,	In Error to the Supreme Court of the State of Ohio.

[March 6, 1917.]

Mr. Justice Brandeis delivered the opinion of the Court.

Mrs. Pennington obtained in a state court of Ohio a decree of of divorce which is admitted to be valid. In the same proceeding she sought alimony; and in order to ensure its payment joined as a defendant the Fourth National Bank of Cincinnati in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the bank from paying out any part of the deposit. Under later orders of the court the bank made payments from it to the wife. Finally it was perpetually enjoined from making any payment to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the Fourteenth Amendment, and were void; since he was a non-resident of Ohio, had not been personally served with process within the State, had not voluntarily appeared in the suit, and had been served by publication only, all of which the bank knew. Payment of the check was refused. Thereupon Pennington brought, in another state court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was brought to this Court for review, Pennington still claiming that his constitutional rights had been violated.

The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. *Chicago, Rock Island & Pacific Railway* v. *Sturm*, 174 U. S. 710. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk*, 198 U. S. 215. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam*. *Pennoyer* v. *Neff*, 95 U. S. 714. But garnishment or foreign attachment is a proceeding *quasi in rem*. *Freeman* v. *Alderson*, 119 U. S. 185, 187. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be

valid not *in personam*, but as a charge to be satisfied out of the property seized. Cases are cited in the margin.*

The objection that this proceeding was void, because there was no seizure of the *res* at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law. Cases are cited in the margin.†

Affirmed.

*Enforcement of allowance of alimony from property of absent defendant seized at the commencement of the suit by attachment or similar process. Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885; Thurston *v.* Thurston, 58 Minnesota, 279; Wood *v.* Price, 79 N. J. Eq. 1, 9-10. See Bailey *v.* Bailey, 127 N. C. 474; Twing *v.* O'Meara, 59 Iowa 326, 331. Cf. Bunnell *v.* Bunnell, 25 Fed. 214, 218.

The wife's inchoate right to alimony makes her a creditor of the husband under the statutes against fraudulent conveyances. Livermore *v.* Boutelle, 11 Gray (Mass.) 217, 220; Thurston *v.* Thurston, 58 Minnesota 279; Murray *v.* Murray, 115 California, 266, 274; Hinds *v.* Hinds, 80 Alabama 225, 227.

†An injunction issued against a resident debtor of a non-resident defendant is a sufficient seizure of the defendant's property to give jurisdiction. Bragg *v.* Gaynor, 85 Wisconsin 468, 487. See Murray *v.* Murray, 115 California, 266, 276. See Tyler *v.* Judges of the Court of Registration, 175 Mass. 71, 77.

A true copy.

Test:

Clerk Supreme Court, U. S.